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In The

SUPREME COURT OF THE UNITED STATES

No. 73-1713

ROBERT LEE SMYZER, SR. ..... PETITIONER

VS.

COMMONWEALTH OF KENTUCKY .... RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The Opinion of the Kentucky Court of Appeals was a Memorandum Opinion, not to be cited as authority and which will not be reported.[1]

1. RULE 1.310(b) of the Rules of the Kentucky Court of Appeals provides: "If the issues presented in a case do not involve any new or substantial point of law or any question of public importance the Court may direct that the opinion not be reported officially or cited as authority, which direction will be stated in the opinion and shall be noted by the Clerk on the docket. The opinions in such cases will not detail the facts and will dispose of the issues in a summary manner."

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I. **WHETHER THE KENTUCKY COURT OF APPEALS CORRECTLY DECIDED THAT THERE WAS NO SUBSTANTIAL PROBABILITY THAT PREJUDICE RESULTED TO THE PETITIONER FROM VARIOUS PARTS OF THE PROSECUTING ATTORNEY'S CLOSING ARGUMENT.**

II. **WHETHER THE KENTUCKY COURT OF APPEALS CORRECTLY DECIDED THAT ADEQUATE DILIGENCE AND EFFORT WERE NOT DISPLAYED BY PETITIONER'S DEFENSE COUNSEL SO AS TO HAVE PRESERVED FOR A REVIEW ON THE MERITS OF AN ALLEGATION OF ERROR CONCERNING THE JURY'S ALLEGED REQUEST DURING DELIBERATION FOR AN AFFIDAVIT READ INTO THE RECORD BUT NOT INTRODUCED AS AN EXHIBIT.**

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct. Additional material facts and corrections will be set out in the respective arguments which follow.

ARGUMENT

I.

THE KENTUCKY COURT OF APPEALS CORRECTLY DECIDED THAT THERE WAS NO SUBSTANTIAL PROBABILITY THAT PREJUDICE RESULTED TO THE PETITIONER FROM VARIOUS PARTS OF THE PROSECUTING ATTORNEY'S CLOSING ARGUMENT.

Petitioner asserts that the Kentucky Commonwealth Attorney exceeded the bounds of propriety in his closing argument to the jury. This is an incorrect assertion.

The Kentucky Court of Appeals' Opinion in this case, first sentence, states: "It is the opinion of the Court that there is no substantial probability that prejudice resulted from various parts of the prosecuting attorney's closing argument." (See Appendix of Petition at page 1a.) Respondent respectfully submits and reiterates that none of the comments of the Commonwealth Attorney were error, let alone error of constitutional dimensions.

Petitioner complains about the comment of the Commonwealth Attorney in the closing argument that in preparing this case for trial he did not feel he needed any more evidence for conviction than what he produced. This statement along with reasonable comment upon the testimony and facts that had come into evidence by several witnesses placed no new facts before the jury. There was no comment by the Commonwealth Attorney that even served to corroborate the already abundant evidence of

guilt. These comments were not of an evidentiary nature but were non-consequential, fugitive statements by the prosecuting attorney in the zeal of his cause. Only when it is made clear that an attorney has gone outside of the record for his facts and sought by this method to take an undue and unfair advantage of the accused would the court be justified in interfering. *Turner* v. *Commonwealth*, Ky., 275 S.W. 2d 409 (1954); *Lee* v. *Commonwealth*, 142 Ky. 742, 135 S.W. 315 (1911). The frailty of human nature must be recognized and in the heat of argument inappropriate remarks are liable to be made; but unless they are altogether unfounded from any fact or circumstance appearing in the case, and manifest such a wide departure from legitimate deductions as to be at once poisonous and prejudicial, a reversal will not be in order for that reason alone. *Music* v. *Commonwealth*, 186 Ky. 45, 215 S.W. 116 (1919) at page 121. See also *Hunt* v. *Commonwealth*, Ky., 466 S.W.2d 957, 959 (1971). The statements of the Commonwealth Attorney did not present to the jury one strain of evidence of fact that the jury did not know of before he commenced on his closing summation. Counsel for the Commonwealth was in effect indicating to the jury that it was the evidence that had been introduced that was to guide the sensible ladies and gentlemen of the jury in their deliberation on this case.

As for the statements made by the Commonwealth Attorney reflecting the prerogative of the jury to hang and that if they in fact did so, he would try it again, were statements that in all likelihood weakened the case for the prosecution rather than bolstered it. The jury was made plainly aware that if any one of them

did not feel the prosecution had put on proof adequate to find the petitioner guilty beyond a reasonable doubt, they should not feel compelled to change their position to conform with other members of the jury. The jury could either acquit the petitioner under the appropriate instruction or become a hung jury unable to render a verdict.

The Kentucky Court of Appeals stated concerning the above discussed statements as follows: "The remarks with reference to the prosecuting attorney's willingness to try the case over again if the jury thought he hadn't produced enough evidence could be construed as implying that the Commonwealth had more evidence of guilt than it had introduced, but we think such a construction would be a strained one not likely to have been made by the jury." (See Appendix of Petition at pages 1a-2a.)

Additionally, petitioner asserts three other aspects of the prosecuting attorney's summation to the jury. The first of these contentions is pressed on the basis that the possibility of parole was indirectly mentioned in the closing argument of the Commonwealth Attorney. The statement referred to was as follows:

> "Now as you probably also know there's only one crime in Kentucky that you can give more punishment for than murder, and that's rape; rape you can get life without parole." (Transcript of Evidence at page 122.) (See Appendix of Petition at page 5a.)

Thus, the attorney for the Commonwealth made only an off-handed reference to the possibility of parole that was not prejudicial in the least. The Commonwealth Attorney gave no details about the parole scheme or any facts about it.

Respondent acknowledged the large number of Kentucky cases concerning discussion of parole when this case was on direct appeal to the Kentucky Court of Appeals. Yet it was also clearly brought out that in most of these cases the statements about parole have been toward how many years an individual would have to serve before he is eligible for parole. See *Broyles* v. *Commonwealth*, Ky., 267 S.W.2d 73 (1954); *Ringo* v. *Commonwealth*, Ky.. 346 S.W.2d 21 (1961). If it is not improper and prejudicial for the trial court to say that parole is not for the jury to consider, it also cannot be prejudicial to tell them that rape is the only crime in Kentucky for which a convicted person can get life without parole. See *Brown* v. *Commonwealth*, Ky., 445 S.W.2d 848 (1969). The Kentucky Court of Appeals stated in *Broyles* v. *Commonwealth*, supra, at page 76, "the average juror does know there is a parole law in Kentucky."

On this indirect statement relative to the parole issue, the Kentucky Court of Appeals in its Opinion in this case stated: "The indirect reference to parole was not likely to have been construed by the jury as a suggestion that it would be all right to convict the defendant, even if the jury had doubts, because the life sentence could be reduced through parole." (See Appendix of Petition at page 1a.)

The second of these additional allegations of error concerns a reference by the Commonwealth Attorney during his closing argument to a photograph of the deceased at the scene of the crime, which had been excluded by the trial judge from evidence. Five photographs were admitted but the sixth, showing the deceased lying on the floor shortly after his death, was not to be seen by the jury. The Commonwealth Attorney, in making some reference that there did exist this sixth picture; did not travel beyond the limits or bounds of propriety so far as to be prejudicial to the petitioner. Referring to this sixth picture did not add anything to what had already been verbally painted before the jurors' eyes. They knew very well how the deceased had died. They knew how deep and how long the slash was on the deceased's neck. They knew there was a considerable loss of blood. The Commonwealth Attorney's mention of this sixth picture could not have had an inflammatory and prejudicial impact upon the jury. The jury was keenly aware of the blood and gore of this case long before time for closing arguments.

The Kentucky Court of Appeals stated in their Opinion in regard to this picture issue: "The statement that the Commonwealth had taken a picture of the deceased victim that was 'so gory' that it couldn't be introduced was not calculated to inflame the jury, since the mere word 'gory' was not of an inflammatory nature such as would be the picture itself." (See Appendix of Petition at page 1a.)

The last of these three incidents that occurred during the Commonwealth Attorney's summation to the jury is the accusation that the Commonwealth Attorney purposely dropped to the floor out of an envelope several items belonging to the deceased which had been referred to by other witnesses, but which had not been specifically introduced into evidence. The accusation is a brazen one, inferring that the Commonwealth Attorney intentionally dropped this envelope so as to exhibit these objects to the jury. The objects fell to the floor not while the Commonwealth Attorney was summing up the case to the jury, but after returning to counsel's table following proceedings had at the bench out of the hearing of the jury and apparently while the jury was intent upon listening to the trial judge telling the jury they could retire to the jury room. (See Appendix of Petition at page 12a-13a.) Petitioner's trial counsel, after the jury had left the jury box, approached the bench to complain that the Commonwealth Attorney had dropped from his pocket an envelope spilling out two pocket knives and several sticks of wood, and a bottle of medication of some type, all items belonging to the deceased and taken off his body by the coroner.

The Kentucky Court of Appeals on this last issue above-discussed stated: "The court is of the opinion that the act of the prosecuting attorney (whether intentional or inadvertent) in dropping to the floor certain objects which had been mentioned in testimony but not introduced in evidence, was not calculated to prejudice

the jury. The objects were not of material evidentiary importance." (See Appendix of Petition at page 2a.)

Petitioner maintains that these statements and remarks of the Commonwealth Attorney in this case present an issue of violations of the Sixth Amendment right of confrontation. Unquestionably the petitioner has the right to meet the witnesses testifying against him face to face. And, this right was not denied in the case at bar. The petitioner contends that the Commonwealth Attorney was an unsworn witness against him and not subject to cross-examination. Yet, as has been pointed out above and as was pointed out in the Kentucky Court of Appeals, none of the comments by the Commonwealth Attorney were of an evidentiary nature. He placed no facts before the jury that they were not already advised of. He asserted no material fact that the testimony does not support, or which asserted fact was not deducible from other facts or circumstances proven. Therefore, in that the Commonwealth Attorney did not go outside the prescribed limits within which counsel in their argument to the jury should be confined, there cannot be an issue of confrontation. The Kentucky Court of Appeals stated in its Opinion that they did not consider the statement and remarks of the Commonwealth Attorney constituted the giving of material testimony such as to be a violation of the right of the petitioner, under Section 11 of the Kentucky Constitution and the Sixth Amendment to the United States Constitution, to be confronted by the witnesses against him. (See Appendix of Petition at page 2a.)

Petitioner further maintains that the "errors" of the prosecuting attorney through his prosecutorial statements should be reviewed under the "reasonable doubt" standard set forth in *Chapman* v. *California,* 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967). One of the fatal flaws in this argument is the necessity for there to have been adjudged that an error or errors were committed to which any "error" standard may be applied. That is, the petitioner must show that the prosecutor's comments in question were improper or error at all before an issue arises as to whether a recognized error is harmless or prejudicial. In the direct appeal of this case to the Kentucky Court of Appeals, that reviewing court found the complained of prosecutorial statements not to be error. In that the Kentucky Court of Appeals determined there to be no error it was unnecessary for a consideration pursuant to Kentucky Rules of Criminal Procedure, hereafter "RCr," 9.24, the state harmless error rule, which states as follows: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." The Kentucky harmless error standard, as with any harmless error standard, is predicated on the determination by an appellate court that what has been complained of on appeal is error. Upon making that determination, that there was in fact an error, defect, irregularity or variance in the trial below, then and only then must an analysis be made by the reviewing court as to whether the error was prejudicial or harmless to the accused, recognizing all the while that some errors are per se prejudicial.

Thus, in the case presently before this Court, the state appellate court recognized that no error had occurred by the Commonwealth Attorney's statements and actions and there was no application of Kentucky's harmless error rule. Since there was found no need to consider the application of Kentucky's harmless error rule, RCr 9.24, there can be no grounds to base an argument that the *Chapman* standard for harmless error should have been utilized.

Furthermore, another flaw in the case herein is that the *Chapman* standard is applicable to federal constitutional error. Petitioner cites no authority which would support the proposition that the alleged errors involving prosecutorial statements during closing argument are such that they are a violation of due process and thus are to be elevated to the level of federal constitutional error. Since there is no federal constitutional error, in fact no error at all, in this case, it is unnecessary to consider the petitioner's argument that the alleged errors were not harmless beyond a reasonable doubt under *Chapman*, supra, and its progeny. See, for example, *Davis* v. *Craven*, 485 F.2d 1138 (9th Cir. 1973).

This Court does not sit as a court of criminal appeals to review state criminal cases. *Burgett* v. *Texas*, 389 U.S. 109, 19 L.Ed. 2d 319, 88 S.Ct. 258 (1967). Respondent submits that petitioner's application for certiorari should be denied.

II.

THE KENTUCKY COURT OF APPEALS CORRECTLY DECIDED THAT ADEQUATE DILIGENCE AND EFFORT WERE NOT DISPLAYED BY PETITIONER'S DEFENSE SO AS TO HAVE PRESERVED FOR A REVIEW ON THE MERITS OF AN ALLEGATION OF ERROR CONCERNING THE JURY'S ALLEGED REQUEST DURING DELIBERATION FOR AN AFFIDAVIT READ INTO THE RECORD BUT NOT INTRODUCED AS AN EXHIBIT.

Petitioner's second argument concerns an affidavit. At the trial of this case, counsel for the petitioner requested of the trial court, at the bench out of hearing of the jury, to be allowed to read into evidence an affidavit and for admonishment to the jury that they were to accept the affidavit the same as it would be if it were testimony. The trial court permitted the affidavit to be read into the record before the jury. (See Footnote One, Petition for Writ of Certiorari, at page 19.)

The interesting thing about this affidavit, it should be noted, is that the affiant is the petitioner herein who is stating in that affidavit what *another individual* would state if he were at the trial to testify. Be the proprietv of this as it may, the hassle concerning this affidavit supposedly commences when during the jury deliberation a request was made to the bailiff in charge of the jury that they be allowed to have this affidavit. The affidavit itself, the piece of paper, was not introduced into the record as a defense exhibit.

The sole evidence of this alleged request is the conversation, supposedly over the telephone, between peti-

tioner's trial counsel and one of the jurors at petitioner's trial. This conversation supposedly took place on the 9th day of March, 1973. The jury's verdict finding petitioner guilty of willful murder and fixing his punishing at life in the penitentiary was returned in open court on the 27th day of February, 1973. Petitioner by counsel orally moved the trial court for a new trial on the same date, the 27th of February. Subsequently, and in full compliance with Kentucky Rule of Criminal Procedure, Rule 10.06[2], the petitioner by counsel on the first day of March, 1973, filed a written motion for new trial. This motion was initially passed to March 16, 1973.

Thus, as it can be calculated, the taped conversation purportedly between one of the jurors, a Mr. McGee, and petitioner's trial counsel, did not occur until after the written motion for new trial was filed and seven days before the hearing was scheduled on motion before the court.

A tape recording of the alleged telephone conversation was filed at the hearing on the motion for new trial on March 16, 1973. Petitioner did not attempt to verify the matters concerning the affidavit by offering into the record any affidavits supporting it. No one, especially the trial judge, had the benefit of know-

2. "RULE 10.06 TIME FOR MOTION: The motion for a new trial shall be served not later than five (5) days after return of the verdict. A motion for a new trial based upon the ground of newly discovered evidence shall be made within one (1) year after the entry of the judgment or at a later time if the court for good cause so permits."

ing if that tape recording was made on the 9th of March or when. Furthermore, and more importantly, there was no way of knowing whether the voice heard on the tape is that of the juror, Mr. McGee, or someone else. No attempt was made by defense counsel to amend his motion and grounds for new trial although a week transpired from the time the telephone conversation allegedly took place (March 9, 1973), until the date of the hearing on the motion (March 16, 1973). In fact, not until March 29, 1973, after two passings of the motion by the judge on the 16th of March, 1973, and again on the 23rd of March to the 29th of March, 1973, was any amended motion filed of record in this case. Thus, considerable time had passed that would have afforded the opportunity for petitioner's defense counsel to have brought this Mr. McGee into defense counsel's office for the purpose of making a sworn affidavit to the truthfulness of the statements credited to him heard on the tape that was tendered to the court. Moreover, there was apparently no attempt to get an affidavit of the bailiff to tender to the trial court to support this ground for a new trial. Without any affidavits or other verified evidence to support the affidavit contention for new trial. the court did not have much to consider and did overrule this and all other grounds for new trial.

One additional factor to be considered is that Kentucky's criminal procedure rules continue the engrained policy against jurors undertaking to impeach a verdict where they participated in the deliberations concerning it except to establish that the verdict was arrived at by

lot. Kentucky Rules of Criminal Procedure, Rule 10.04.[3] (See *Brown* v. *Commonwealth,* Ky., 490 S.W.2d 731 (1973); *Hill* v. *Commonwealth,* Ky., 474 S.W.2d 95 (1971). Also see *Brown* v. *United States,* 224 F.2d 845, 848 (6th Cir. 1955).

Under all of the circumstances disclosed above, there was no showing sufficient to overcome the presumption of regularity of the verdict and no abuse of discretion on the part of the trial court in denying this ground for a new trial.

This case, of course, was appealed to the Kentucky Court of Appeals. One of the grounds argued for reversal was that the trial court erred in rejecting as a basis for a new trial the alleged denial by the bailiff of the jury's request that there be brought into the jury room an affidavit as to the testimony of an absent witness. The Kentucky Court of Appeals' Opinion in this case, considering that the whole argument was so unverified and unsupported by the record, is profound wherein it states as follows: (See Appendix of Petition at pages 2a-3a.)

> "The trial court did not err in rejecting as a basis for a new trial the alleged denial by the bailiff of the jury's request that there be brought into the jury room an affidavit as to the testimony

3. "RULE 10.04 EXAMINATION OF JURORS AFTER VERDICT: A juror cannot be examined to establish a ground for a new trial, except to establish that the verdict was made by lot."

> of an absent witness. Counsel did not raise this ground until a week after he had discovered it, and then did not present any affidavit in support of the ground. The matter originally was suggested in an informal way, and no formal amendment to the motion for a new trial was filed until several days later. It is the opinion of this court that to invoke the serious action of setting aside a conviction of murder, greater diligence and effort was required."

As can be seen from the quote from the Kentucky Court of Appeals' Opinion above, the highest state court in Kentucky did not pass on the merits of the question presented.

The Kentucky Court of Appeals did not make a determination as to whether or not this alleged incident involving the bailiff, if it had been properly preserved and placed before them for review, would constitute error. Of course, the Kentucky Court of Appeals also did not review this allegation against the yardstick of RCr 9.24, the Kentucky harmless error rule. Thus, there is no harmless error issue to which an argument concerning *Chapman* v. *California*, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967) may be made.

In light of the circumstances set forth above, we submit it is unnecessary for this Court to consider this question involving the "denied affidavit," because the question was not properly preserved for review by the Kentucky Court of Appeals and no constitutional dimensions concerning this issue were considered by that reviewing court.

CONCLUSION

The petitioner has failed to establish any circumstances which would require certiorari to be granted in this case. The evidence overwhelmingly supports the conclusions of the trial court and Kentucky Court of Appeals. No substantial federal question is presented and certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, James M. Ringo, one of counsel for respondent, hereby certify that the foregoing Brief was served on petitioner by depositing three copies of same in the United States mail, first class postage prepaid, on June 13, 1974, addressed to counsel for petitioner, Honorable Frank E. Haddad, Jr., 529 Kentucky Home Life Building, Louisville, Kentucky 40202.

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